No. 86-1796

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SEQUOIA BOOKS, INC.,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Appellate Court, Second Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I.

Without a final judgment in this case, does this Court lack certiorari jurisdiction under 28 U.S.C. § 1257.

II.

Do pleading requirements for a common law nuisance action present substantial federal constitutional questions for certiorari review.

III.

Should this Court grant certiorari review merely to provide authoritative construction for the Illinois Public Nuisance Act.

IV.

Did the complaint in this particular case, summarily dismissed on petitioner's motion and without injunctive relief, impose a prior restraint on protected speech in violation of the first amendment.

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STATEMENT

According to the amended complaint for equitable relief filed by the State of Illinois in June of 1983, petitioner Sequoia Books, Inc. operates the Denmark Bookstore in Kendall County, Illinois. Count One alleges that petitioner sells obscene movies, video tapes, and magazines depicting specific types of sexual conduct enumerated in the complaint. This count further alleges that sales of these materials have continued since July, 1982, that several Sequoia employees have been charged with criminal offenses for sales of these materials, that the criminal law

has not had any "limiting effect" on those sales, and that complainant has no adequate remedy at law. The complaint alleges injury to the public welfare, and seeks injunctive relief from the sale of these materials to prevent a multiplicity of criminal actions and to protect the citizens of the county from the irreparable injury that would otherwise result.

Count Two repeats the allegation that petitioner sells the aforementioned obscene materials that depict enumerated types of sexual conduct. This Count also alleges that the owners and occupants "permit the following conduct to take place within the building known as the Denmark Bookstore, namely: fellatio" and that the bookstore is used for "the purpose of lewdness and assignation." After alleging that there is no adequate remedy at law, that an injunction would prevent a multiplicity of criminal actions, and that irreparable injury would result unless petitioner's activities are restrained, complainant seeks to have the bookstore declared a public nuisance, to obtain an injunction, and to abate the nuisance for the period of one year.

According to the stipulation later filed by the parties, Count One has been amended to allege the number of criminal prosecutions maintained against Sequoia employees under the Illinois criminal obscenity statute. Since 1982, sixteen cases have been filed but have not proceeded to trial. An additional ten cases are pending on appeals from complaint dismissals.

In the instant case, the trial court judge dismissed the complaint on Sequoia's motion for failure to state a cause of action. (App. 42-45). The Illinois appellate court reversed and remanded the case for hearing on the complaint. (App. 1-19).

No injunction of any kind has ever issued in this case. (App. 5).

REASONS FOR DENYING THE WRIT

I.

SINCE THERE IS NO FINAL JUDGMENT IN THIS CASE, THIS COURT LACKS CERTIORARI JURISDICTION UNDER 28 U.S.C. § 1257.

In this complaint for equitable relief, respondent seeks an injunction against sales of obscene materials and closure of the Denmark Bookstore. The trial court granted petitioner's motion to dismiss the complaint for failure to state a cause of action. The Illinois appellate court reversed and remanded to the trial court for a hearing on the complaint. Petitioner subsequently obtained a stay of that court's order. As a result, no injunction or closure order of any kind has ever issued in this case. Because the appellate court's order directing further proceedings is not a final judgment, the petition for writ of certiorari must be denied.

The jurisdiction conferred by Congress in 28 U.S.C. § 1257 to review state court decisions is limited to "[f]inal judgments" of the highest court of the state in which a decision may be had. As a result, this finality requirement generally precludes certiorari review when further proceedings in the state courts, other than those of a ministerial nature, have been ordered. *Gospel Army v. Los Angeles*, 331 U.S. 543 (1947) (where the appellate court had reversed an order granting an injunction) and *Louisiana Navigation Co. v. Oyster Comm'n*, 226 U.S. 99 (1912) (where the trial court's decision, to dismiss a petition for failure to state a cause of action, had been reversed on appeal).

On remand in this case, the trial court must now decide, *inter alia*, whether petitioner's materials are obscene as

a matter of first amendment law. Where, as here, the state courts have not yet resolved the federal question of obscenity, certiorari review must be denied for want of a final judgment even though the case implicates first amendment concerns. *Flynt v. Ohio*, 451 U.S. 619 (1981) (per curiam) (where the state appellate court had reversed an order of indictment dismissal and remanded the case for trial).

Because there is no final judgment in this case, the certiorari petition must be dismissed for want of jurisdiction.

II.

THE PLEADING REQUIREMENTS FOR A COMMON LAW NUISANCE ACTION DO NOT PRESENT SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTIONS FOR CERTIORARI REVIEW.

In Count One of the complaint, respondent seeks to enjoin sales of "obscene" materials, depicting enumerated types of sexual conduct, under a common law nuisance theory. Sequoia Books, Inc. ["Sequoia"] does not allege a due process violation and does not argue that it received inadequate notice of the proscribed nature of its activities. Sequoia instead looks to the first amendment, alleging that the complaint was vague and overly broad. Sequoia specifically objects on the ground that respondent's complaint did not allege the obscenity definition within *Miller v. California*, 413 U.S. 15 (1973) or the Illinois criminal obscenity statute, Ill. Rev. Stat. ch. 38, para. 11-20 (1983). (Pet. Br. 10). Sequoia also claims that respondent did not sufficiently allege the absence of an adequate remedy at law. (Pet. Br. 10-12). Certiorari review should be denied for several reasons.

First, petitioner has exaggerated the potential sweep of the common law nuisance action. It may be true that

the term "obscenity" eludes precise definition. An allegation of "obscenity", without additional description, does not offend the Constitution, however. *Roth v. United States*, 354 U.S. 476, 491-92 (1957) (rejecting a due process challenge to a criminal statute), as cited with approval in *Miller*, 413 U.S. at 27, n.10. Moreover, the reach of a common law nuisance action has been limited in Illinois by adopting the definition of obscenity found within section 11-20 of the state's penal code. *Chicago v. Festival Theatre Corp.*, 91 Ill. 2d 295, 306-307, 438 N.E.2d 159 (1982). That criminal obscenity statute, construed as coextensive with *Miller* and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), has been judged constitutional by this Court. *People v. Ridens*, 59 Ill. 2d 362, 321 N.E.2d 264 (1974), *cert. denied*, 421 U.S. 993 (1975); *Ward v. Illinois*, 431 U.S. 767 (1977). By authoritative construction, then, Illinois has imported the *Miller-Memoirs* definition into common law nuisance actions tried in its courts. It is also noteworthy that, in this particular case, respondent's complaint described the kinds of sexual activity portrayed in Sequoia's material. Sequoia's motion necessarily admitted those allegations as true. The same activities were deemed "patently offensive sexual conduct" in *Miller*, 413 U.S. at 25.

More importantly, however, no hearing has yet been held in this case. On remand, respondent's "obscenity" allegation must be tested in an adversarial hearing according to the prevailing constitutional standards for obscenity cases. In *Paris Adult Theatre v. Slayton*, 413 U.S. 49, 55 (1973), this Court approved a Georgia civil injunctive procedure which had similarly adopted the state's penal definition of obscenity. This Court noted that, when the hearing procedure uses the prevailing first amendment standard, the purveyor of materials receives the "best

possible notice" of the unprotected nature of his materials. *Accord, Roth,* 354 U.S. at 492. Because Sequoia's materials must be proven to be "obscene" under the *Miller* and *Memoirs* definitions, there is no possibility of a "total ban of all communicative materials", (Pet. Br. 9), and there is no possibility that protected speech will be affected in this common law nuisance action.

Petitioner's remaining argument in this section similarly seeks to incorporate the rigors of proof into the pleading stage. Sequoia argues that respondent cannot prove the absence of a remedy at law (Pet. Br. 10-12), but this remains to be seen during a hearing on remand in this case. In this challenge to the sufficiency of a complaint, the issue is not whether the State will ultimately prevail but whether the State is entitled to offer evidence in support of its claim. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974); *Build of Buffalo, Inc. v. Sedita,* 441 F.2d 284, 286-89 (2d Cir. 1971) (a complaint should not be dismissed because an injunction would not likely be granted). In this connection, Sequoia also improperly asserts that a "clear violation" of its first amendment right has already occurred even though no injunction has ever issued in this case. (Pet. Br. 13).

In summary, Sequoia has not presented any substantial federal constitutional question for certiorari review. This petition presents the exceptionally narrow question whether the complaint in this particular case was sufficient to survive a motion to dismiss for failure to state a claim. This Court does not sit to assess the sufficiency of individual pleadings, however. The issues framed by Sequoia are of interest primarily to the litigants rather than to the general public. As this Court has noted in *Layne and Bowler Corp. v. Western Well Works,* 261 U.S. 387, 393 (1923) and *Wilkerson v. McCarthy,* 336 U.S. 53,

66-67 (1949), review by writ of certiorari is improper in the absence of an issue of immediate public significance.

III.

THIS COURT SHOULD NOT GRANT CERTIORARI REVIEW MERELY TO PROVIDE AUTHORITATIVE CONSTRUCTION FOR THE ILLINOIS PUBLIC NUISANCE ACT.

In its next argument, Sequoia challenges the second count of the complaint in which respondent seeks to declare the Denmark Bookstore a public nuisance under Ill. Rev. Stat. ch. 100½, sec. 1 *et seq.* (1983). In what has been termed a "bald conclusory statement" (Pet. Br. 13) in this initial pleading, respondent alleges that the owners and operators permit fellatio to take place in the bookstore. This allegation is, of course, now deemed to be admitted by Sequoia's dismissal motion. The sole issue presented for certiorari review is whether the "alleged act clearly fall[s] within the statutory proscription" for public nuisances. (Pet. Br. 14).

The pertinent statute defines a public nuisance as a place used for purposes of "lewdness, assignation, or prostitution." (App. 28). Sequoia claims that the appellate court sought to bring the conduct within the meaning of the term "assignation" (Pet. Br. 14), but this is clearly incorrect. The appellate court construed the statute and held that permitting acts of fellatio constitutes a "lewd" use of the premises within the meaning of the Act. (App. 15).

Sequoia also claims that, as a matter of Illinois law, a complainant must allege a pattern of present and continuing conduct performed on a commercial basis. Construing the statute, the appellate court in this case disagreed.

(App. 18). In another portion of its brief, Sequoia alleges a conflict within the decisions of the Illinois appellate courts on this point. (Pet. Br. 7). This court should not be asked to umpire this alleged dispute or to resolve state law questions, however. *Brinkerhoff—Faris Trust and Savings Co. v. Hill*, 281 U.S. 673, 680 (1930). The authoritative construction of the Illinois Public Nuisance Act is the concern and responsibility of the Illinois courts alone. Certiorari jurisdiction under 28 U.S.C. § 1257 should be denied for want of a federal question.

IV.

THE COMPLAINT IN THIS CASE, SUMMARILY DISMISSED ON SEQUOIA'S MOTION AND WITHOUT INJUNCTIVE RELIEF, COULD NOT POSSIBLY IMPOSE A PRIOR RESTRAINT ON PROTECTED SPEECH TO VIOLATE THE FIRST AMENDMENT.

In its final claim for certiorari review, Sequoia alleges that the requested closure order within the complaint constitutes a prior restraint in violation of the first amendment. Although the complaint specifically seeks to declare the bookstore a public nuisance because the act of fellatio is permitted on the premises, Sequoia argues that the "blanket" prohibition of a closure order extends to protected, *i.e.* non-obscene, materials. (Pet. Br. 16). Sequoia does not challenge the constitutionality of the Illinois Public Nuisance Act itself. Sequoia's argument is without merit for three reasons.

First, there could not possibly be any prior restraint in this case because no injunction or closure order ever issued. The complaint was dismissed on Sequoia's motion. As a result, the appellate court decided that it "need not consider the question of prior restraint" at all in this case. (App. 5).

Equally important, respondent does not seek a "blanket" order which could extend to protected materials. As the appellate court noted, complainant seeks only to enjoin sales of materials proven obscene after adversarial hearing. (App. 7). *See Kingsley Books Inc. v. Brown*, 354 U.S. 436, 440 (1957) (upholding an injunction for books proven to be "indecent") and *Festival Theatre*, 91 Ill. 2d at 311 (an Illinois injunction does nothing more than "order the defendants not to violate the criminal laws against obscenity"). Compare petitioner's cited authority, *Vance v. Universal Amusement, Inc.*, 445 U.S. 308 (1980) (condemning a prior restraint of movies not yet adjudged to be obscene). At an adversarial hearing on remand, respondent will be required to prove the unprotected nature of Sequoia's materials. Because this determination must still be made, there is no possibility of a prior restraint or violation of the *Freedman v. Maryland*, 380 U.S. 51 (1965) safeguards. (Pet. Br. 17). *Accord, Paris Adult Theatre*, 413 U.S. at 55.

Finally, this Court has already endorsed this equitable action as a measure less restrictive of first amendment freedoms. *See, e.g., Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957) and *Paris Adult Theatre*, 413 U.S. at 55. In the recent decision of *Arcara v. Cloud Books Inc.*, ____ U.S. ____, 106 S. Ct. 3172, 92 L. Ed. 2d 568 (1986), this Court reviewed a New York public nuisance act conceded by Sequoia to be "virtually identical" to the Illinois legislation. (Pet. Br. 14). The New York statute also directed closure of the premises for one year upon proof of lewd activities. 106 S. Ct. at 3174. Cloud Books, like Sequoia, had permitted acts of fellatio to occur on the premises. *Id.* at 3173. Observing that the statute regulated conduct rather than free expression, this Court held that the closure order therein did not operate as a prior restraint

of protected material in violation of the first amendment. *Id.* at 3177 and n.2. Sequoia's claim is explicitly foreclosed by the *Arcara* decision which leaves no room for controversy in this case.

CONCLUSION

Even if petitioner presented substantial federal questions for review, there is no final judgment to support certiorari jurisdiction in this case. Respondent respectfully urges this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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